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MISCELLANY.

Criminal Jurisdiction of State Court over Military Forces.—The stationing of troops to guard various places of industrial or military importance has already resulted in the death of several civilians under circumstances which would have constituted a crime against the state laws had it not been for the military exigency. In some communities which do not realize the legal and moral duties devolving on the citizens of a nation at war there may be an attempt to assert a state jurisdiction in such cases. During and after the war of 1812 an act of Congress provided for the removal to a federal court of all actions and prosecutions for acts connected with the war. (See *Wetherbee v. Johnson*, 14 Mass. 412.) A similar act was passed in 1863, and amended in 1866, with reference to the acts of civil and military officers in the prosecution of the Civil War. No such act is now in force, but as far as concerns members of the armed service of the United States or of the militia when called into the federal service, no statute is necessary to divest the state courts of jurisdiction. Even in time of peace, an act done by an officer of the United States in the execution of his duty as such is not an offense against state laws, and the federal courts will summarily discharge him from any attempted state restraint. (*Tennessee v. Davis*, 100 U. S. 257; *In re Neagle*, 135 U. S. 1.) If in time of peace they permit the state court to act, it is done only as an exercise of discretion, and as a matter of comity. *U. S. v. Lewis*, 200 U. S. 1. Thus in the case of *In re Fair*, 100 Fed. 149, a private soldier held for murder in a state court for shooting in pursuance of an order of a sergeant was discharged on habeas corpus. In *Ex parte Schlaffer*, 154 Fed. 921, such a discharge was granted though the act for which the soldier was held was committed while he was off duty and was in no way connected with his military duty. In the case of *In re Wulzen*, 235 Fed. 362, Ann. Cas. 1917A 279, a member of the militia mobilized for service in Mexico was discharged from a state arrest. The reason which lies behind the rule is, of course, that during the time the federal soldier or officer is under arrest he is withdrawn from the performance of his duty to the nation. *Tennessee v. Davis*, supra; *In re Waite*, 81 Fed. 359; *In re Wulzen*, supra. That reason was well illustrated in the *Neagle* case, wherein it appeared that Marshall Neagle was arrested by a local constable, leaving Mr. Justice Field unguarded at a time when the wife and accomplice of his would be assassin was at large brandishing a weapon and threatening vengeance. "The government of the United States may by means of physical force execute on every foot of American soil the power and functions that belong to it." Mr. Justice Bradley in *Ex parte Siebold*, 100 U. S. 395.

"The general government must cease to exist whenever it loses

the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the states. If when thus acting, and within the scope of their authority, those officers can be arrested, brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal government authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. . . . We do not think such an element of weakness is to be found in the constitution.” Mr. Justice Strong in *Tennessee v. Davis*, *supra*.

In time of war the local commanding officer is not bound to permit the arrest of an enlisted man by any civil authority, state or federal. Rev. St. § 1342, 1 Fed. St. Ann. (2d Ed.) 458. If a military commander refuses in time of war to obey an order of court no effort will be made to enforce it. *Ex p. Merryman*, Taney 246, 17 Fed. Cas. No. 9487; *Ex p. Vallandigham*, 27 Fed. Cas. No. 16,816; *In re Kemp*, 16 Wis. 359. It would seem clear, therefore, that during the continuance of the war any state tribunal which seeks in any way to take cognizance of an act of a member of the armed forces is inviting a peremptory rebuff.—Law Notes.

Military Jurisdiction over Spies and Sympathizers.—During a national war with any first class power the Federal Constitution does not enure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign. All spies should be forthwith tried by court martial and if convicted, shot (U. S. Revised Statutes, § 1343). Enemy sympathizers after conviction by court martial should be either confined at hard labor during the war or else should be deported to the enemy country as was Vallandigham.

In 1863 Vallandigham, the state leader of a great party in Ohio, publicly sympathized with the Confederacy. Ohio was not at that time invaded. The courts were open. Vallandigham was tried by court martial, was convicted of sedition and sympathizing with the confederacy, and was sentenced to confinement in a fortress during the war. The Supreme Court refused to interfere (*Ex parte Vallandigham*, 1 Wall. 243, 251-4). By way of commutation of sentence he was then deported to the Confederacy.

In 1904, Peabody, then Governor of Colorado, declared a county to be in a state of insurrection and ordered one Moyer to be arrested as a leader of the outbreak and detained by the national guard until he could be safely discharged and then to be delivered to the civil authorities. This was done purely as a military arrest and confinement without any civil process. It does not appear that

the civil courts in the county were closed during the insurrection. After the termination of the insurrection Moyer sued the former Governor, the former adjutant general of the national guard, and the captain of the company which arrested and confined him, for an alleged wrongful imprisonment. The Supreme Court unanimously upheld the acts of the Governor and the militia. (*Moyer v. Peabody*, 212 U. S. 78.)

In 1901, during the Boer war, a South African was arrested by order of the military authorities, removed 300 miles from his home and confined in a civil jail by order of the military in a district in which, while martial law prevailed, the civil courts remained open. The Privy Council upheld the arrest and confinement. (*Ex parte Marais*, A. C. (1902), 109, 114-6.)

In 1902, during the Boer war, convictions of imprisonment at hard labor and fines under martial law by an administrator of martial law for acts contravening martial law regulations against sedition and unlawful travel and removal, were upheld though made by the same person who was also the civil magistrate and whose civil courts were open at the time. (*Atty. Genl. v. Van Reenan*, A. C. (1904), 114, 118-9.)

In 1914 a New Zealand reserve officer not in actual service went to Samoa after its capture and after all German resistance had ceased, and violated war regulations by exporting gold coin from Samoa, carrying personal letters from German prisoners there to their friends interned in New Zealand and carrying photographs of captured German wireless station as well as manuscript for the editors of two New Zealand papers. He was taken back to Samoa, tried there before a military court, convicted and sentenced to five years imprisonment in New Zealand. The New Zealand Supreme Court upheld the conviction and sentence. (*Re Gaudin*, 34 New Zealand, L. R. 401.)

In 1915 a South African was arrested for violating a martial law regulation forbidding seditious language and held for trial before a special military court. The Boer rebellion in South Africa did not break out until after the alleged sedition was committed and the civil courts remained open. The Supreme Court of South Africa refused to inquire into the matter or to restrain the military court from trying all those charged with violating the martial law regulations, notwithstanding that the civil courts remained open. (*Krohn v. Minister for Defence*, South African L. R. (1915) Appellate Division, 191, 197-212.)

In 1914 an Australian statute authorizing the detention and confinement in military custody during the war of any naturalized person whom the Minister of Defence believed to be disaffected or disloyal without the production of any evidence whatever, was up-

held on the principle of the necessity of a dictatorship during a national war. (*Lloyd v. Wallach*, 20 Commonwealth L. R. 299, 310-311.)

In 1818, after the Mahratta Government at Poona had been overthrown, the Peishwa (or native absolute sovereign) surrendered and his country was conquered. Lord Elphinstone, the commissioner commanding the occupied territory, seized the treasure and account books in the custody of the late treasurer of the native government. Hostilities had ceased and the civil and criminal courts of the East India Company were open. The treasurer's executors recovered judgment for what the Municipal Court of Bombay held was the private property or private treasure of the native ruler, as well as the treasurer's own property, which had been blended with the private treasure. The Privy Council held that no civil court had jurisdiction, that recourse could only be had to the Government of India for redress (*Elphinstone v. Bedrechund*, 1 Knapp, P. C., 316, 360-1).

The Milligan case is not in point. The only question actually there decided was the legal but not constitutional question that the statute relied upon as a basis for the military courts did not in fact give authority to establish them in the places where they were set up.

Stieber, the chief of the Prussian spies in the wars of 1866 and 1870, says in his memoirs that in the presence of von Bismarck he told an officer of the Prussian General staff that his (invisible) army of 30,000 Prussian spies was as much a Prussian "army" as the (visible and much larger) "fighting army" of von Moltke, and that von Bismarck tacitly admitted it (*Lanoir, German Spy System in France*, 70-72).

The militaristic feudalism which has wantonly attacked us in the course of its struggle for world power or downfall, justifies its attempt to conquer the world by asserting that all free governments are disintegrating; that all free peoples are either corrupt, decadent or degenerate; that treaties, international law and constitutions are all alike, nothing but scraps of paper; that feudalism with its war lords, Krupps, spies and cannon fodder is so superior to all free governments and all free people that it is above all laws, divine, international or human; also it asserts that no free government or free people have any rights which feudalism is bound to respect.

Any who assert that the Federal Constitution enures to the benefit of spies, secret agents of or sympathizers with the public enemy, must claim that the framers intended the Constitution to aid feudalism to conquer freedom. Any who assert that the spies of and sympathizers with a public enemy who desires to conquer and plunder us as Cortez did to Mexico and Pizarro did to Peru are entitled

to the protection of the Constitution, must believe that the Constitution intended to limit and restruct the war power so as to deprive the Nation of all means of defence.—Henry A. Forster in *American Law Review*, New York.

Timely Words on Naturalization of Aliens.—On September 19, 1917, Hon. John M. Tierney, presiding at Special Term, Part II, of the New York Supreme Court, before proceeding to examine applicants for citizenship, addressed them as follows:

You gentlemen, who are here seeking to become American citizens, are welcomed by the court. In greeting you this morning I think it is my duty, as it is a pleasure, to say a few words to you concerning the step that you are about to take. When you shall have been admitted to that privilege you will have had conferred upon you one of the best gifts that any government can bestow. You will be given all the privileges of every other American citizen, no matter whether he be a citizen by birth or adoption; no matter how distinguished his lineage may be; no matter whether his forefathers fought for the creation of this government and the perpetuity of its free institutions. You men realize that here come the oppressed from all nations, and that they have been welcomed with open arms. They are here given the opportunity of living their lives as human beings should live. Many of you, no doubt, have come from lands where the conditions of living are almost intolerable. You have sought and found an asylum and a refuge here. Many of you may achieve distinction; perhaps some of you may adorn legislative halls, perhaps the bench of our courts; others perhaps may attain success in commercial life. That is up to yourselves. All that this country expects of you is that you shall be good and loyal citizens, that you shall obey the law and shall respect authority. The privilege that you get carries with it a corresponding obligation upon your part to respect the institutions that have been built up by the wisdom of those who have made this country great. Our constitution guarantees free speech. That privilege will always be maintained; it will never be abridged while this country exists. But free speech means that while men may declare their opinions in respect of anything freely, they must do so respectfully; not by violence; not by seeking to throw down what this country has built up; not by the incitement of disorder; not by haranguing the multitude on the highways and thus sowing seeds of treason and sedition, which has become so frequent of late. That will be put down with a firm hand by the officers of this government. And if any of you men here today applying for citizenship have a mental reservation in respect of the discharge of the obligations that you assume you had better stop right now and go no further; because I for one keep a careful eye

upon those whom I admit to citizenship and see to it that they obey our laws and respect our authority.

Now, gentlemen, you realize, of course, what a great country this is, but I am putting up to you this morning this question. It was well asked by one of our leading journals: What does America mean to you? Is it just a place where wages are high, where conditions of life are easy, where you have the opportunity some day to rise into a higher class and boss some one who now bosses you? It is all that; but it is much more. It is the land of democracy, which means the rule of the people. We live by the principle that every man, white or black, has so much of the divine that he shall be subject to no human master. No king or class can determine the laws under which labor is performed, under which property is owned, under which taxation is paid, under which war is declared and prosecuted. Laws in America proceed only from the sovereign people itself. Within the frameworks of these laws each American's destiny is in his own hands. Thanks to George Washington, and the men who fought at his side, the American Revolution of 1775 became the United States of 1787. What Washington and his compatriots founded in eight years of war, Lincoln and his generation preserved and broadened through four years of conflict. The great things of this world have not been won or preserved save by war against the forces that would destroy them.

The experiment we are making is being watched throughout the world. The signs of democracy's failure are the signs of disunity and discord, the signs that wealth and ease are dearer than country, signs of unwillingness to take the field in the country's cause. Every autocratic element in the world will view with joy any inner resistance to our preparation for military strength. Every democratic element in the world, in England, Russia, Germany, will openly or secretly rejoice to see America show herself strong to fight for what her people have declared is the right.

Recently ten millions of free men were called on to register with the government. From them have been selected five hundred thousand, who will have the privilege and duty to render military service to their country. The eyes of the world are turned upon us today. What they are watching is the test of that political institution which springs from the concept of the brotherhood of man. Can free and equal brothers live in amity, form and execute common purposes, unite in solid and unswerving defense of their joint heritage, or must we confirm history's suspicion that men cannot develop the strength a nation needs except under the lash of a master? America's action will contribute to answer these questions. You, by your action, will contribute. Do not give other Americans cause to be ashamed that you shunned your duty—not only to your country, but to civilization. Remember at all times that the love of country and of state should

be most enduring, and that reverence for law is the foundation of good citizenship. Some people spend much of their time in criticism of the institutions about us without any deep feeling of real dissatisfaction. You should not get the impression from that that our nation and our country, which, in spite of the faults and imperfections that are manifest, is great and glorious, is made up of those faults and imperfections. Reverence the things that are real and good and mighty in our people and our country and recognize them, and let time teach you the imperfections, if there be any, that you can help correct when the time comes. Fight against the enemies' selfishness, dishonesty and oppression as steadfastly as you would against a foreign foe. Learn again and again the lesson that eternal vigilance is the price of liberty, that the opportunities you enjoy today were bought with the hard price of devotion and sacrifice of the fathers of our land and country, and that if you are to keep these opportunities for yourselves and for those who shall follow you, you must pay the price of loyalty and unselfishness and ceaseless watchfulness that the right shall prevail, that wrong shall not steal in while you sleep and usurp the high places. The safety of this republic depends now and for all time on the character of its citizenship.

I have said these things to you in the thought and hope that it will sink into your hearts upon this most important day. Keep in mind the things that I have said to you and your lives are bound to be happy, and when you shall be called by the Almighty to render an account of your stewardship the Lord may say. Well done thou good and faithful servants.